IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 03/09/2003

Coram

The Hon'ble Mr.Justice S.SARDAR ZACKRIA HUSSAIN

Civil Revision Petition(N.P.D.) No.393 of 2003
C.R.P. No. 394 of 2003
and
C.M.P.No.4073 of 2003

M.Ponnupandian. ... Petitioner in both C.R.Ps.

-Vs-

1.Selvabakiyam.
2.Pasa Annamarial.
3.Bethelraj.
4.Minor Kodipritha

(Minor 4th respondent represented
through her father and guardian
3rd respondent Bethelraj). ... Respondents in both C.R.Ps.

Civil Revision Petitions under Section 115 C.P.C. against the common order and decretal orders dated 27.2.2003 in E.A.No.72 of 2003 and 71 of 2003 respectively in E.P.No.178 of 2001 in O.S.No.6 of 1992 on the file of the Principal Sub Court, Thenkasi.

!For petitioner in
both C.R.Ps. : Mr.K.Vijayan,
Senior Counsel
for M/s.La Law.

^For first respondent : Mrs.Hema Sampath.

For respondents 2 to 4: Given up.

:COMMON ORDER

Both the Civil Revision Petitions are filed against the common order in E.A.Nos.72 of 2003 and 71 of 2003 respectively in E.P.No.178 of 2 001 in O.S.No.6 of 1992 on the file of the Principal Sub Court, Thenkasi. The

parties are described as per their rankings in the suit.

2. The first respondent Selvabakiyam filed O.S.No.6 of 1992 on the file of the Sub Court, Thenkasi against her son, Ponnu Pandian, the first defendant and her daughters, the defendants 2 and 3 and 2 others claiming partition of one-third share. The suit was resisted and after contest, preliminary decree for partition was passed on 8.9.1997. Pursuant to the preliminary decree, final decree was also passed on 1 4.7.2000. The plaintiff Selvabakiyam filed Execution Petition in E. P.No.178 of 2001 on 19.10.2001. In the Execution Petition, respondents 2 to 4, namely defendants 2 to 4 remained absent and were set ex parte. The first defendant, namely, the revision petitioner entered appearance on 2.4.2002 and took time to file counter till 10.12.2002 and on that date, since no counter was filed, delivery was ordered by 31.12.2002.

3. The revision petitioner filed E.A.No.72 of 2003 to set aside the ex parte order dated 10.12.2002 in E.P.No.178 of 2001 and E.A.No.71 of 2003 to condone the delay of 23 days in filing such petition by stating in the affidavit of petitions that he was doing business in Kerala and only on 20.1.2003 he came to know about the ex parte order and on contact his advocate, his advocate informed that since he did not file counter, he was set ex parte. After obtaining copy of necessary papers relating to O.S.No.6 of 1992 from Tirunelveli District Court, a counter has been prepared in which there has been delay of 23 days in filing the petition to set aside ex parte order dated 10.1 2.2002. Therefore, the revision petitioner filed both the petitions.

4. The above petitions were resisted by the plaintiff by filing counter. It is stated that only to delay the proceedings, the petitions have been filed. It is further stated in the counter that after the revision petitioner was set ex parte on 10.12.2002 for not filing counter, delivery was ordered and the bailiff when went to the suit property to execute the delivery order, the bailiff was prevented by the revision petitioner and a report was also submitted by the bailiff. Therefore, it is untrue that the first defendant, viz., the revision petitioner came to know about the ex parte order passed against him only on 20.1.2003. The reasons for not filing the petitions immediately on coming to know admittedly on 20.1.2003 are not acceptable. The petitions were also challenged on the ground that the petitions filed to condone the delay in filing the petition to set aside the ex parte order are not maintainable as per Limitation Act 36/1963. Further, as per counter it is also stated that just to defeat the right of the plaintiff in obtaining the fruits of the decree, both the petitions were filed.

5. The Executing Court after considering the arguments advanced and after considering the case of both parties, ultimately dismissed both the petitions that the petition in E.A.No.71 of 2003 filed under Section 5 of the Limitation Act to condone the delay is not maintainable and that there is no satisfactory explanation to set aside the ex parte order dated 10.12.2002 in the Executing Court. Both the orders were challenged in these Civil Revision

Petitions.

6. The point for determination is as to whether there is any ground to interfere with the common order passed by the Court below.

7. The learned counsel for the revision petitioner made the following submissions. It is argued that though Section 5 of the Limitation Act bars an application to condone the delay in execution proceedings, but proviso to Rule 105 of Order XXI of Civil Procedure Code empowers the Court to condone the delay. The learned counsel also brought to the notice of this Court the amendment of this Court by inserting the proviso to Rule 105 of Order XXI of Civil Procedure Code enabling the Court to condone the delay notwithstanding the bar under Section 5 of the Limitation Act which is subsequent to the Limitation Act. Further according to the learned counsel for the revision petitioner, as per Order XXI Rule 105(3) C.P.C. proviso inserted by the amendment of this Court, an application for condonation of delay is maintainable. In this regard, the learned counsel for the revision petitioner also contended that since the Civil Procedure Code was introduced in the year 1908, it did not enable the application of Section 5 of the Limitation Act. To enable the extension of time for the Act introduced after the Limitation Act, an amendment was brought under Order XXI Rule 105 by inserting clause 4 which enabled the application of Section 5, such amendment was brought by the power of this Court for amendment under Section 122 C.P.C. in the year 1945 and as such, according to the counsel for the revision petitioner, from 1945 to 1963 until the subsequent amendment to Limitation Act, in the year 1963, power to condone the delay was available under Order XXI Rule 105(4) C. P.C. and only in the year 1963, a special ban was brought prohibiting extension of time in the new Limitation Act, in so far as the applications made under the Order XXI C.P.C. So, according to the learned counsel for the revision petitioner, the amendment of this Court made in the year 1945 i.e., Rule 105(4) was redundant and inconsistent with Limitation Act, 1963. This High Court in the year 1972 by amendment introduced proviso to Rule 105(3) without referring to Limitation Act and deleted Rule 105(4). The amended Rule 105(3) enabling condonation is having its source not with reference to Limitation Act, but independently in C.P.C. itself. As such, the amendment enabled an application for condonation of delay by providing separately under C. P.C. without referring to Limitation Act. The C.P.C. as amended Act 1 04/76 did not make any change to the High Court Amendment, and on the contrary, it saved the amendment under Section 97 of the Amendment Act, allowing to continue the High Court amendment. So, the condonation of delay is an inherent power created by the High Court amendment and available for any applications under Order XXI, notwithstanding the bar under Section 5 of the Limitation Act and can be applied independently under Order XXI, Rule 105(3) proviso. Further, according to the learned counsel for the revision petitioner, the judgment of a Division Bench of this Court reported in 1989-1 Law Weekly 178 (S.M.Natarajan vs. - Devayaniammal and others) which has been followed by the Executing Court has no bearing to the issue in dispute. The learned counsel for the revision petitioner has brought to the notice of this Court the decision reported in A.I.R. 1995 Madras 242 (R. Parasuraman vs. - Jayalakshmi Ammal and others)

"Civil Procedure Code (5 of 1908), Section 47, Order 21, Rule 105(4)(Madras) – Execution proceedings – Delay – condonation – Provisions under Limitation Act, 1908 are applicable to proceedings by virtue of Order XXI, Rule 105(4) – Rejection of application for condonation of delay as Limitation Act, 1963 is not applicable to execution proceedings – Not proper."

8. The learned counsel for the respondent argued that the Executing Court following the judgment of a Division Bench of this Court reported in 1989-1 Law Weekly, 178 (cited above), has rightly decided that the application filed to condone the delay of 23 days in filing the petition to set aside the ex parte order dated 10.12.2002 is not maintainable and such finding does not call for any interference by this Court. The learned counsel for the respondent also argued that as per Section 97 of Civil Procedure Code (Amendment) Act (104 of 1976) on any amendment Act on any amendment made or provision inserted in the C.P.C. by a State Legislature prior to the commencement of the Amending Act, i.e., prior to 1.2.1977 in the different local areas, if they be inconsistent with the C.P.C., as amended by the Amending Act, would stand repealed. Further the learned counsel for the respondent contended that the delay in filing the petition to set aside the ex parte order in the Execution Petition in E.P.No.178 of 2001 is not maintainable under Rule 105 of Order XXI C.P.C. The learned counsel also cited the following decisions:-

(1) 99 Law Weekly, Supreme Court 481 (Ganpat Giri – vs. - IInd Additional District Judge, Balia & others). At page 485 the Supreme Court has observed:-

" . . . the effect of Section 97(1) is that all local amendments made to any of the provisions of the Code either by a State Legislature or by a High Court which were inconsistent with the Code as amended by the amending Act stood repealed irrespective of the fact whether the corresponding provision in the code had been amended or modified by the Amending Act and that was subject only to what was found in sub-section(2) of Section 97."

(2) 2001 (4) C.T.C. (Supreme Court), 314 (Dadi Jaganndham – vs. _ Jammulu Ramulu and others). The Supreme Court has ruled at page 319:-

". . . the settled principles of interpretation are that the court must proceed on the assumption that the legislature did not make a mistake and that it did what it intended to do. The court must, as far as possible, adopt a construction which will carry out the obvious intention of the legislature. Undoubtedly if there is a defect or an omission in the words used by the legislature, the court would not go to its aid to correct or make up the deficiency. The court could not add words to a statute or read words into it which are not there, especially when the literal reading produces an

intelligible result. The court cannot aid the legislature's defective phrasing of an Act, or add and mend, and, by construction, make u p deficiencies which are there."

9. The facts are not in dispute, namely, the first respondent filed

E.P.No.178 of 2001 for executing the final decree for partition and the revision petitioner entered appearance on 2.4.2002 and took time to file counter. He was set ex parte on 10.12.2002 since no counter was filed on that date and delivery was ordered by 31.12.2002. Then, the revision petitioner filed E.A.No.72 of 2003 to set aside the ex parte order dated 10.12.2002 under Order XXI Rule 106 and Section 151 C.P.C. and E.A.No.71 of 2003 to condone the delay of 23 days in filing the said petition under Section 5 of the Limitation Act.

10. The executing Court dismissed both the applications that there is no satisfactory explanation and also not maintainable following the judgment of a Division Bench of this Court in N.M.Natarajan vs. - Deivayanai Ammal and others, 1989-1 Law Weekly 178. At page 179, the Division Bench has observed:-

"Section 5 of the Limitation Act, 1963, is not applicable to a petition filed for setting aside the orders passed ex parte under Rule 10 6 of Order 21 C.P.C. and the provision contained in sub rule(4) of Rule 105 (Madras Amendment) is no longer in force.

As we have already noticed sub rule (1) of rule 105 (Madras Amendment) was introduced prior to the Limitation Act of 1963. It is to be noted that the said sub-rule specifically refers to the Limitation Act of 1908. As long as the old Limitation Act and the old Civil Procedure Code were in force, there was no difficulty in applying the provisions of section 5 of the old Limitation Act. But, now the position is clearly changed after the enactment of section 5 of the present Limitation Act, 1963.

With reference to applications under Order 21 C.P.C., there is a statutory bar in applying the provisions of Section 5 of the Indian Limitation Act. It is also seen that Section 32 of the new Limitation Act says that the Indian Limitation Act, 1908 is hereby repealed. The new Limitation Act was brought into force by Act 36 of 1963. This aspect was taken note of by the Parliament at the time when the Amending Act 104 of 1976 was passed. That is the reason why rule 106 of Order 21 C.P.C. did not make any reference as to the applicability of Section 5 of the Limitation Act. The omission in the new Civil Procedure Code relating to the applicability of Section 5 of the Limitation Act is patently express, and therefore, it has to be held that there is inconsistency between these two provisions. In view of the overriding effect of the provisions contained in the Amending Act and in Section 5 of the new Limitation Act, it has to be concluded that there is inconsistency between the similar provisions and, therefore, to the extent of the omission, the old Act stands repealed, with the result that Section 5 of the Limitation Act cannot be now invoked with regard to the petition filed for setting aside the ex parte orders made under Order 21, Rule 105 C.P.C. as held by the Andhra Pradesh High Court in Mupparaju Sreeramulu vs. - Pidikiti Kotiah 1980-1 An.W.R.174."

11. Therefore, it is well settled now that Section 5 of the Limitation Act, 1963 is not applicable to the petition filed for setting aside the orders passed ex parte under Rule 106 of Order XXI C.P.C. and the

provision contained in Sub-rule (4) of Rule 105 (Madras Amendment) is no longer in force. However, it has been held by a learned single Judge of this Court in A.I.R. 1995 Madras 242 (R.Parasuraman vs. - Jayalakshmi Ammal and others), that the provisions under the Limitation Act, 1908 are applicable to the proceedings by virtue of the Order XXI Rule 105(4) C.P.C. and rejection of application for condonation of delay as Limitation Act 1963 is not applicable to execution proceedings is not proper. It appears that the judgment of the Division Bench of this Court, 1989-1 Law Weekly, 178(cited above) was not brought to the notice of the learned Single Judge in rendering the decision as such.

12. To the Code of Civil Procedure, 1908, under Order XXI Rules 10 4 to 106 had been inserted by Madras (Pondicherry) Amendment (P.Dis.No. 397 of 1945 dated 4.9.1945. Rule 105(3) reads:-

"An application under sub-rule (1) shall be made within thirty days of the date of the order or where in the case of an ex parte order the notice was not duly served, the date when the applicant had knowledge of the order."

Rule 105(4) reads:-

"The provisions of Section 5 of the Indian Limitation Act, 1908, shall apply to applications under sub-rule (1)"

This Court made the following amendment to Order XXI Rule 105(4) of Code of Civil Procedure Code, 1908 dated 1.11.1972:-

"In the Code of Civil Procedure, 1908, in Order XXI, -
(i) Delete sub-rule (4) of rule 105;
(ii) insert the following proviso to sub-rule (3) of Rule 105:-

"Provided that an application may be admitted after the said period of thirty days if the applicant satisfies the court that he had sufficient cause for not making the application within such period."

As per C.P.C., Act 104 of 1976 under Order XXI rule 106(3) an application under sub rule (1) shall be made within 30 days from the date of the order or where in the case of an ex parte order the notice was not duly served, within 30 days from the date when the applicant had knowledge of the order. Therefore, the amendment inserted by Madras(Pondicherry) Amendment, extracted above with reference to Rule 105(3) and 105(4) which in fact was deleted by the amendment of this Court as stated above have not been incorporated in the C.P.C. as amended (Act 104 of 1976). So, it cannot be said that the provisions of the Limitation Act, 1908 are applicable to proceedings by virtue of the Order XXI Rule 105(4) and despite the fact it has been made clear under Section 5 of Limitation Act that the extension of prescribed period in certain cases cannot be availed of by the application made under Order XXI of Civil Procedure Code, 1908.

13. This Court in 1984 M.L.J.(R) 214 (Ayappa Naicker vs. - Subbammal and another) has held at page 215:-

"With reference to applications under Order 21, Civil Procedure Code there is the statutory bar in applying section 5 of the Limitation Act. It may also be relevant to note section 32 of the Limitation Act before it was repealed by Central Act LVI of 1974. It is stated under that section that the Indian Limitation Act, 1908, is hereby repealed. Therefore, after 1st January, 1964 sub-rule(4) of rule 105 of Order 21, Civil Procedure Code could no longer be applied, because of the express language of section 5 of the Limitation Act. That is why the Central Code in rule l05 of Order 21, Civil Procedure Code did not make any reference to the same saying that section 5 of the Limitation Act would be applicable.

The question of invoking inherent powers under section 151, Civil Procedure Code does not arise in this case. That is because of the specific provisions contained under rule 106 of Order 21, Civil Procedure Code. If, therefore, there is repugnancy between the Central Code under rule 106 and the Madras Amendment under sub-rule (4) of rule 105 of Order 21 it is section 97 of the Civil Procedure Code in relation to repeal and savings that would apply. That says that any amendment made or any provision inserted in the principal Act by a State Legislature or a High Court before the commencement of this Act shall except in so far as such amendment of provision is consistent with the provisions of the principal Act as amended by this Act, shall stand repealed.

The principal Act, namely Central Code, does not make section 5 of the Limitation Act applicable, while the Madras Amendment does make it applicable. Therefore to that extent there is repugnancy.

There is yet another way of looking at the matter. Sub-rule(4) of rule 105 of Order 21, Civil Procedure (Madras Amendment) makes a reference only to the Indian Limitation Act, 1908. After it is repealed there is no possibility of applying the same."

The above judgment had been approved by a Division Bench of this Court in N.M.Natarajan vs. - Deivayanai Ammal and others, 1989-1 Law Weekly 178.

14. Therefore, in any view of the matter, it is clear that E.A.No.7 1 of 2003 filed to condone the delay of 23 days in filing E.A.No.72 of 2002 to set aside the ex parte order dated 10.12.2002 in E.P.No.178 of 2001 is not maintainable. In that, Order 21 Rule 106 and Section 151 C.P.C. have no application and consequently E.A.No.72 of 2002 to set aside the ex parte order dated 10.12.29002 cannot also be allowed and taking all these aspects, rightly the executing Court has dismissed both the applications. Such finding does not call for any interference by this Court.

15. The Civil Revision Petitions fail and the same are dismissed with costs. Consequently, the petition in C.M.P.No.4073 of 2003 is also dismissed.

Index: Yes
Internet:Yes

ts.

To
The Principal Sub Judge,
Thenkasi.